

6810
DECISION



M. Hordale, O'II
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-191169

DATE: June 23, 1978

MATTER OF: E. I. du Pont de Nemours & Company

DIGEST:

1. IFB solicited "brand name or equal" product and specified salient characteristics to be met. Acceptance of "equal" product for award was not unreasonable where agency determined that such product satisfied stated characteristics based on prior acceptability of product. Also, protester has not pointed to specific areas of deviation other than general statements that "equal" product has not been tested and IFB contained no testing requirement.
2. Salient characteristics specified by contracting officials in IFB supersede those unlisted brand name characteristics and item's alleged failure to comply with latter affords no basis for rejection of bid.
3. Questions relating to contractor compliance with delivery schedule are matters of contract administration, not reviewable under Bid Protest Procedures.
4. GAO does not review protests against affirmative determinations of responsibility by contracting officials except for reasons not applicable in this case.

Invitation for bids (IFB) No. 0067735, issued by the Department of Agriculture, Forest Service, Portland, Oregon (Forest Service), on December 20, 1977, solicited bids on a brand name or equal basis for plastic netting in tubes, as follows:

"NETTING, plastic, photodegradable within five years, minimum life of 30 months, diamond mesh, in tubes 2-in. diameter, DuPont tubing, No. 445-V-020P 2% UV Green (Vexar by E.I. DuPont de Nemours and Company) or equal.

Color: Translucent green 30 Inch Lengths

"NETTING, plastic, photodegradable within five years, minimum life of 30 months, diamond mesh, in tubes 3-in. diameter, DuPont tubing, No. 445-V-030P 2% UV Green (Vexar by E.I. DuPont de Nemours and Company) or equal.

Color: Translucent green (1) 12 Inch Lengths

(2) 18 Inch Lengths

(3) 30 Inch Lengths"

E. I. du Pont de Nemours & Company (du Pont) submitted a bid on its tubing, Vexar, the specified brand name products. The only other bid received was from Nalle Plastics, Inc. (Nalle), the eventual low bidder.

Initially, du Pont orally notified the Forest Service of its intent to protest against any award to Nalle, as Nalle's product, Naltex, was not equal to du Pont's Vexar. Subsequently, the Forest Service denied the protest and made award to Nalle since there was an urgent need for the plastic netting. As a result, du Pont protested the award of the contract to Nalle to our Office on the basis that (a) "the Nalle material has not been tested or proven to be equal to the DuPont product," (b) "delivery schedules as of January 24, 1978, are not being met," and (c) "the risk of failure in the field far exceeds the difference in bid value."

Essentially, du Pont questions the Forest Service's determination that Naltex was equal to Vexar and responsive to the IFB. Du Pont argues that since Vexar was required to undergo testing prior to approval as meeting the needs of the Forest Service, Nalle's product should also be required to do likewise. Du Pont points out that the Department of the Interior, Fish and Wildlife Service,

in a cooperative study with du Pont, from 1968-1974 gathered information concerning the desirable structure and resin formulation of Vexar and its application and published the results in Wildlife Leaflet 508 (1973). We note that such publication recommends the use of Vexar, but the recommendation "is intended as a standard to obtain good seedling protection and growths." Also, du Pont states that Vexar has undergone weatherability tests performed at the Forest Service Laboratory, Missoula, Montana, with one result being that UV Green, referred to above, endured from 3-1/2 to 4-1/2 years. Apparently, du Pont contends that Naltex should submit Naltex to these same tests and, until completed, Naltex is not an acceptable "or equal" product.

Division 200 of the IFB, "TECHNICAL SPECIFICATIONS," provided that the "[t]ubing shall be specified in the Schedule of Items," see above. The desired specifications or characteristics were specified by the Forest Service in the schedule. Du Pont contends that Naltex, in addition to meeting the listed characteristics, should be required to meet the following characteristics, which are characteristics of Vexar:

- "a. 50 mil strand nominal - + 20%
- "b. 3/8-inch mesh - 3 strands per inch - + 10%
- "c. angle 70° to 85°
- "d. polypropylene resin
- "e. ultra-violet stabilizer 5% (when compounded in PE resins)."

Du Pont believes that equity demands such a requirement or, alternatively, any bidder should "* * * submit proof [that] their alternate designs would perform in an equal manner."

The Forest Service position is that the Naltex to be supplied meets the "or equal" specification of the IFB and will meet the needs of the Forest Service even though it is not an exact duplicate of Vexar. The contracting officer advises that he is aware of several prior contracts where

netting produced and supplied by Nalle was accepted as equal to Vexar and "has performed satisfactorily insofar as the needs of the Forest Service and the requirements of these contracts." In addition, we note that Nalle, prior to the issuance of the instant solicitation, submitted samples of its product and test results on its tree guard netting, performed by the Exxon Chemical Company.

After a review of the record, it is our opinion that Nalle's product meets the the salient characteristics designated by the Forest Service in the IFB. We are unable to conclude that the Forest Service's evaluation of and acceptance of Nalle's product were unreasonable based on the prior history of the acceptability of the product. This is particularly so where du Pont has not pointed to specific areas of deviation other than general statements that the Nalle product has not been tested. Moreover, there is no testing requirement in the IFB.


With respect to du Pont's argument that unlisted characteristics must be met, we do not agree. While the identification of a brand name item indicates the "quality and characteristics" of satisfactory products, this is actually accomplished by listing only those salient, or prominent, characteristics of such item which are necessary to satisfy the Government's needs. Moreover, those salient characteristics, specified by the procuring activity, supersede the unlisted brand name characteristics. See General Hydraulics Corporation, B-181537, August 30, 1974, 74-2 CPD 133. Thus, the alleged failure of Naltex to conform to Vexar in aspects which are not listed as "salient characteristics" affords no basis for rejection of Nalle's bid. Omni-Spectra, Inc., B-184341, April 14, 1976, 76-1 CPD 251. Also see, Apollo Lasers, Inc.; Solid State Radiations, Inc., B-179423, February 21, 1974, 74-1 CPD 86.

Concerning du Pont's contention that Nalle, as of January 24, 1978, had not complied with the delivery schedule, a question concerning whether or not there is compliance with a delivery schedule is a matter of contract administration which is the function and responsibility of the procuring activity. Matters of contract administration are not for resolution under

our Bid Protest Procedures, 4 C.F.R. part 20 (1977), which are reserved for "considering whether an award or proposed award of a contract complies with statutory, regulatory and other legal requirements. Techheimer Brothers Company, B-188651, September 21, 1977, 77-2 CPD 210.

Implicit in du Pont's final argument, that the risk of failure far exceeds the difference in bid value, is the questioning of Nalle's capability to perform the contract. However, it is our policy not to review protests concerning affirmative determinations of responsibility, absent, as here, an allegation or demonstration of fraud on the part of the contracting officials or other circumstances not applicable here. Central-Metal Products, Incorporated solicitation No. M2-40-74, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365, affirmed 54 Comp. Gen. 715 (1975), 75-1 CPD 138.

In view of the foregoing, du Pont's protest is denied in part and dismissed in part.


Acting Comptroller General
of the United States